Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1074

ALFRED KARGE, JOHN THOMAS,
AND DAVID ANDERSON,

Petitioners,

vs.

HERBERT MILNES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Respondent respectfully responds under Supreme Court Rule 24 to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit as follows:

QUESTION PRESENTED.

Respondent disagrees with the formulation by the Petitioner of the question presented for review. Based upon the district court record and the orders entered by the Seventh Circuit, the question presented is whether a notice of appeal filed 118 days after the entry by the district court of a decree and judgment order making findings of fact and conclusions of law on all liability issues, including an award of attorneys' fees, although

not fixing the amount thereof, even though $9,965.00 by stipulation was embodied in an order at a later date, was timely filed under 28 U. S. C. § 1291? Thus, the issue is whether an order awarding attorneys' fees, but reserving the amount for a later date, tolls the appeal period under 28 U. S. C. § 1291.

REASONS FOR DENYING THE WRIT.

The reason given by Petitioners for granting a writ of certiorari is that the interpretation of the word "final" as used in 28 U. S. C. § 1291 in the decision of the Court of Appeals for the Seventh Circuit in *Swanson* v. *American Consumer Industries, Inc.*, 517 F. 2d 555 (7th Cir. 1975), is in conflict with the interpretation given in the decision of the Court of Appeals for the Third Circuit in *Richerson* v. *Jones*, 551 F. 2d 918 (3rd Cir. 1977). This Court should deny the writ because those decisions are not in conflict.

Swanson was a shareholders derivative and class action suit to rescind the sale of corporate assets. After two appeals, the Seventh Circuit held that the defendants were liable and that the plaintiff was entitled to reasonable attorneys' fees in an amount to be fixed by the district court. On September 4, 1973 the district court entered a judgment order pursuant to the Seventh Circuit's ruling. On April 4, 1974 the district court entered an order fixing the amount of attorneys' fees to be awarded to the plaintiff. No notice of appeal was filed from the 1973 order but notices purporting to appeal from the 1974 order were filed. The Seventh Circuit held that the final judgment in the case was the 1973 order and that, since plaintiffs failed to appeal that order within thirty days, they lost their right to challenge it.

In *Richerson*, an employment discrimination action, a completely different fact situation existed. There neither of the first two orders entered by the district court determined the issue of whether the plaintiff was entitled to attorneys' fees. The first

order, which was dated December 18, 1975, simply stated that judgment was entered for the plaintiff and against the defendant. The second order, which was dated March 12, 1976, awarded the plaintiff retroactive promotion, back pay and interest but did not include any provisions regarding attorneys' fees. It was only in the third order, the one entered April 29, 1976, that the district court awarded the plaintiff attorneys' fees and expenses. The Third Circuit held that the order of April 29, 1976 was the final decision. Since the order entered April 29, 1976 was the only one including provisions regarding attorneys' fees, it clearly was the final order.

Thus, *Richerson* has no applicability to the issue presented to this Court and there is no conflict between it and the Seventh Circuit's decision in *Swanson*.

We believe the Court's attention should be called, however, to *Williams* v. *Ezell*, 531 F. 2d 1261 (5th Cir. 1976). *Williams* was an action challenging the apportionment of districts and certification of school board candidates. On July 31, 1974 the action was dismissed. The defendant school board subsequently filed a motion seeking attorneys' fees. On October 1, 1974 the district court granted the motion for attorneys' fees, but reserved the amount pending a meeting between the parties. The parties failed to agree and on October 9, 1974 the district court entered an order awarding attorneys' fees to the board. A notice of appeal was filed on November 6, 1974 from the October 1, 1974 and October 9, 1974 orders. The Fifth Circuit held that the October 9, 1974 order was the final order. In so holding the Fifth Circuit relied upon the following language in the October 9, 1974 order:

> ORDERED and ADJUDGED by the Court that the motion for setting reasonable attorneys' fees is hereby GRANTED and the Court sets attorneys' fee at TWO THOUSAND FIVE HUNDRED AND NO/DOLLARS, ($2,500.00). 531 F. 2d at 1263.

Thus, *Williams* is clearly distinguishable from *Swanson* and the case presently before the Court. In *Williams* it was the

second order in which the entitlement to attorneys' fees was determined. Whereas in *Swanson* and the present case the second order merely determined the amount of the attorneys' fees. In the present case, the second order stated:

> IT IS HEREBY ORDERED that the plaintiff shall be, and is hereby, awarded attorneys' fees pursuant to the judgment order of April 19, 1978 against the defendants Alfred Karge, John Thomas and David Anderson in their official capacities as members of the Village of Schiller Park Police and Fire Commission in the amount of $9,965.00 through the date of the entry of this order. (Petition, pp. 131-132.)

Since *Richerson* is not apposite and since *Williams* is distinguishable from *Swanson* there is no conflict between the decisions rendered by Fifth and Seventh Circuits. Thus, there is no reason why this Court should review the Seventh Circuit's order dismissing Petitioners' appeal from the decision of the district court.

CONCLUSION.

Therefore, Respondent respectfully requests that a writ of certiorari be denied.

Respectfully submitted,

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